IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

FIRST APPEAL NO. 260 OF 1990

Bajaj Tempo Limited,
a Company incorporated under
the Companies Act, 1956,
having its factory and
Office at Akurdi, Pune – 411 035... **Appellant**
(Original Applicant)

..**versus**.

Employees State Insurance Corporation,
a Body corporate
having its office at P.M.T.
Commercial Building, Shankar Seth Road,
(Swargate),
Pune – 411 002. .. **Respondent**
(Original opponent)

Mr.Sudhir Talsania , Advocate, i/b
M/s Sanjay Udeshi, & Co. for the Appellant
Mr. H.V. Mehta, Advocate, for the Respondent/Corporation.

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Coram : K.J. Rohee, J.

Reserved on : April 18, 2006.

Pronounced on : May 2, 2006.

Judgment

This is an appeal under Section 82 of the Employees' State Insurance Act, 1948 challenging the order dated 29.1.1990 passed by the Employees' Insurance Court, Pune rejecting the appellant's Application (E.S.I.) No. 11 of 1983 for a declaration that the appellant is not liable to pay any contribution to Employees State Insurance Corporation (hereinafter referred to as "ESIC") in respect of the amount paid by the appellant to the contractors for the construction of new buildings and for the work of repairs and maintenance.

2. There is little dispute about the facts. The appellant is a company which manufactures light commercial vehicles in its factory situated at Akurdi, Pune. It does not have manufacturing activity at any other place. The appellant has employed about 4500 employees, the majority of whom are permanent employees. They are all covered under the Employees' State Insurance Act, 1948 (hereinafter referred to as the "ESI Act" for short).

3. The appellants got buildings constructed in its premises and repairs done to the factory buildings, roads etc. through contractors. On 27.7.1983 one Mr. R.M. Deshpande, Assistant Regional Director of ESIC visited the factory of the appellant in connection with the assessment of ESI contribution. It was found that the appellant had spent Rs.1,18,82,141.38 ps from April 1978 to March 1981 for the construction of the buildings and Rs.3,51,775.34 ps from April 1979 to March 1980 for repairs and maintenance.

4. On 28.9.1983 the Assistant Regional Director of ESIC issued a notice purported to be under Section 45-A of ESI Act to the appellant calling upon the appellant to pay contribution of Rs.2,07,937.45 ps by assessing labour charges at 25 % of the amounts spent for construction of buildings and Rs.12,312.15 ps by assessing 50 % as wages for repairs and maintenance, total Rs.2,20,249.60 ps . The appellant was called upon to pay interest @ 6% P.A after grace period of 21 days and was informed that if the amount is not deposited, it would be recovered as arrears of land revenue. The appellant disputed its liability to pay contribution. Hence the appellant moved an application under Section 77 of the ESI Act before the Employees' Insurance Court.

5. It was contended by the appellant that the persons engaged by the contractors for the purposes of construction of buildings as well as for the repairs and maintenance were not the employees of the appellant. The persons engaged by the contractors for the construction of the buildings or for repairs of the buildings do not fall within the definition of “Employee” under Section 2 (9) of the ESI Act. It was further contended by the appellant that the buildings which were newly constructed were not a factory and no machinery was installed in those buildings. The amounts on which contribution has been claimed includes the cost of raw material such as cement, steel, paint etc. given by the

appellant to the contractors. The construction of the buildings and the repairs and maintenance work is done by the contractors and it is not under the control or supervision of the appellant. The said work is not ordinarily a part of the work of the factory and the appellant cannot be considered to be the principal employer of the persons engaged by the contractors. By raising demand of substantial amount towards contribution, ESIC has done injustice to the appellant. The demand made by the ESIC is not supported by law. The appellant, therefore, prayed for a declaration that the appellant is not liable to pay contribution to ESIC.

6. The respondent/ESIC opposed the application by its written statement. According to the respondent the persons engaged for the work of constructing buildings and repairs and maintenance of the property of the appellant are employees under the provisions of ESI Act. The work of construction as well as repairs and maintenance has a nexus with the work of the appellant. The appellant is, therefore, under legal obligation to cover the persons and to pay contribution to ESIC. It was contended by the respondent that heavy burden lies on the appellant to prove on the basis of the records the exact amount of labour charges involved. However, the appellant failed to furnish detailed bifurcation of the amounts. Under these circumstances, ESIC has assessed 25 % of the amount of construction and 50% of the amount of maintenance and repairs as the amount which is

usually the percentage of labour charges. The appellant is, therefore, liable to pay the said amount as contribution.

7. It was further contended by the respondent that in Case No. 18/1978 the appellant had raised identical question which was finally decided by the Employees' Insurance Court , Pune against the appellant. The appellant did not challenge the decision by preferring appeal against it to the High Court. Hence the decision in Case No. 18/1978 has become final and binding on the appellant and it operates as res judicata. The present application before the Employees' Insurance Court is, therefore, not tenable and deserves to be dismissed.

8. The appellant examined two witnesses viz an Architect and its Deputy Manager working in Accounts Department in order to show that the labour charges worked out by the ESIC were incorrect. The appellants also filed several documents.

9. After considering the oral and documentary evidence on the record, the Employees Insurance Court held that the application moved by the appellant was hit by the principles of res judicata. It held that the persons engaged by the contractors for the purposes of construction of buildings and for repairs and maintenance of buildings are the employees of the appellant within the meaning of Section 2 (9) of the ESI Act and that the appellant is liable to pay contribution as demanded by the respondent. Consequently the Employees' Insurance Court rejected the application of

the appellant. The appellant has challenged the said order of rejection.

10. I have heard Mr. Sanjay Udeshi, Advocate for the appellant/Company and Mr. H.V. Mohta, Advocate for the respondent / E. S. I.C.

11. The following points arise for my determination and I give my findings on them as under:-

POINTS	**FINDINGS**
i) Whether the persons engaged by the contractors for the construction of buildings and repairs and maintenance of the buildings are the employees of the appellant/ company under Section 2(9) of the ESI Act ? ...	Yes.
ii) Whether the appellant/company is liable to pay contribution as claimed by the respondent?...	Yes.
Iii) Whether the principles of res judicata are applicable to the subsequent application moved by the appellant/Company?...	No.
iv) What order ? ..	The appeal is dismissed with costs.

R E A S O N S

12. Para 14 of the impugned order shows that the Employees' Insurance Court did not undertake the exercise to examine whether the persons engaged by the contractors are employees of the appellant as the learned counsel for the appellant during the course of arguments gave up the plea that the persons engaged by the contractors are not the employees of the appellant and admitted the responsibility of the appellant to pay contribution for those employees. In view of these specific observations made by the Employees' Insurance Court, it is not necessary for this Court in appeal to examine the contentions of the appellant that the persons engaged by its contractors are not the employees within the meaning of Section 2(9) of the ESI Act. However, in First Appeal No. 1414/2003 between the same parties, no such concession appears to have been given by the learned counsel for the appellant before the Employees' Insurance Court and hence in that appeal this point has been elaborately dealt with by me. In that appeal I have come to the conclusion that the persons engaged by the contractors are the employees of the appellant within the meaning of Section 2(9)of the ESI Act. Hence in the present appeal I proceed on the assumption that the persons engaged by the contractors are the employees of the appellant.

13. There is no dispute about the amount spent by the appellant for the construction of buildings and repairs and maintenance of the buildings. The only question is as to what

is the quantum of the wages paid to the employees out of the total amount spent by the appellant.

14. It was contended by Mr.Sudhir Talsania, the learned counsel for the appellant, that it was the duty of Mr. R.M. Deshpande, the Assistant Regional Director of ESIC, who visited the office of the appellant, to ascertain the amount of wages from the contractors because Mr. Deshpande had every right to inspect the records of the contractors. Mr. Desdhpande failed in his duty and instead presumed labour charges at 25 % spent for the construction of buildings and 50 % spent for repairs and maintenance of the buildings and charged contribution on that amount. According to Mr. Udeshi the evidence adduced by the witnesses of the appellant shows that the labour charges cannot exceed 16 % to 16.5 % in case of the amount spent for construction of building and 20 % to 25 % in case of the amount spent for repairs and maintenance of the buildings. Mr. Udeshi, therefore, submitted that the Employees' Insurance Court was wrong in accepting the demand made by the respondent to the appellant.

15. Mr. M.V. Mehta, the learned counsel for the respondent, on the other hand submitted that the initial burden of proving the amounts spent for wages rests on the appellant. The appellant is also expected to maintain record in respect of the amount paid by it to the contractors including the amount paid on account of wages of the

employees. It is also a statutory duty of the appellant to maintain necessary documents which the appellant failed to perform and now the appellant wants to take advantage of its own wrong by submitting that the officer of ESIC could have verified the amount of wages from the contractors.

16. I fully endorse the submissions made on behalf of the respondent that it was not the duty of the officer of the ESIC to go to the contractors in order to ascertain the amount of wages paid to the employees, but it was the duty of the appellant to maintain record in order to convey to the ESIC the amount of wages paid to the employees by the contractors. Since the appellant failed in its duty , the officer of ESIC was justified in assuming 25 % as wages out of the amounts spent for construction of buildings and 50 % out of the amount spent for repairs and maintenance of the buildings.

17. The evidence of the Architect examined by the appellant is of no consequence because he specifically admitted during cross-examination that he has no knowledge about the wages paid to the employees by the contractors and that he has given the labour charges approximately. Thus the Employees' Insurance Court was justified in accepting the estimation of the officer of the ESIC.

18. The Employees Insurance Court held that the present proceedings are hit by the principles of res judicata inasmuch as in the earlier Application No. 18/1978 wages

paid to employees were calculated at the same ratio. This finding is apparently wrong in view of the fact that in the earlier proceedings no evidence was adduced by the appellant, whereas in the present case the appellant has tried to adduce evidence though it is not trustworthy.

19. In view of the above circumstances, I find no merit in the appeal which deserves to be dismissed. Hence the order:-

O R D E R

The appeal is dismissed with costs.

(K. J. Rohee, J.)

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